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Promotion and protection of all human rights, civil, political, economic, social and cultural rights, including the right to development

Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, Ben Emmerson*

Summary

The present report is the fourth annual report submitted to the Human Rights Council by the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, Ben Emmerson.

In section II, the Special Rapporteur lists the key activities he undertook from 17 December 2013 to 31 December 2014 and, in section III, he examines the humans rights challenges posed by the fight against the Islamic State in Iraq and the Levant and makes recommendations to States.

* Late submission.

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I. Introduction

1. The present report is submitted to the Human Rights Council pursuant to its resolution 22/8. In the report, the Special Rapporteur lists the key activities he undertook from 17 December to 31 December 2014, focuses on the humans rights challenges posed by the fight against the Islamic State in Iraq and the Levant and makes recommendations.

II. Activities of the Special Rapporteur

2. On 13 February 2014, the Special Rapporteur participated as a speaker in a panel discussion entitled "Debating *Kadi II*: United Nations Ombudsperson v. judicial review in Security Council sanctions decision-making" at the London School of Economics.

3. From 23 to 25 February, the Special Rapporteur participated in an expert seminar on the theme "The right to privacy in the digital age", hosted by the Permanent Missions of Austria, Brazil, Germany, Liechtenstein, Mexico, Norway and Switzerland and facilitated by the Geneva Academy of International Humanitarian Law and Human Rights, in Geneva.

4. On 11 March, the Special Rapporteur presented to the Human Rights Council his report on the use of remotely piloted aircraft, or drones, in extraterritorial lethal counter-terrorism operations, including in the context of asymmetrical armed conflict, and its impact on civilians (A/HRC/25/59). He also held an interactive dialogue with the Council on his visits to Burkina Faso (A/HRC/25/59/Add.1) and Chile (A/HCR/25/59/Add.2).

5. On 12 March, the Special Rapporteur participated as a panellist in a side event on the topic "Human rights and drones" and held a press conference during the twenty-fifth session of the Human Rights Council.

6. On 22 September, during the twenty-seventh session of the Human Rights Council, the Special Rapporteur participated in a panel discussion on the topic "Ensuring use of remotely piloted aircraft or armed drones in counter-terrorism and military operations in accordance with international law, including international human rights and humanitarian law". The panel discussion was held pursuant to Human Rights Council resolution 25/22.

7. On 30 September, the Special Rapporteur participated in a hearing on the topic "Drones and targeted killings: the need to uphold human rights" before the Committee on Legal Affairs and Human Rights of the Parliamentary Assembly of the Council of Europe, in Strasbourg, France.

8. On 2 October, the Special Rapporteur participated in a panel discussion on the securitization of public policy in a post-9/11 world, organized by Amnesty International in London.

9. On 23 October, the Special Rapporteur presented to the General Assembly his report on the use of mass digital surveillance for counter-terrorism purposes and the implications of bulk access technology for the right to privacy under article 17 of the International Covenant on Civil and Political Rights (A/69/397).

III. Human rights in the fight against the Islamic State in Iraq and the Levant

10. In recent years, the Islamic State in Iraq and the Levant (ISIL) has emerged as a key actor in the Middle East and, reportedly, beyond. One of many radical groups that found fertile ground in the violent environments created by decades of instability in Iraq and the

more recent conflict in the Syrian Arab Republic, it has in the past two years become a well-organized, dominant armed force controlling large swathes of populated areas in both Iraq and the Syrian Arab Republic.[1] A self-proclaimed caliphate, it attracts a significant number of individuals from around the world to join its ranks. Deeply rooted in sectarian distrust and an absence of inclusive, participatory processes,[2] ISIL has become a symbol of brutality, extreme violence, cruelty and terror, all of which it has imposed on those living under its rule.

11. There is evidence that ISIL has committed serious violations of international law, including genocide, crimes against humanity, war crimes and serious violations of human rights law. The Security Council has determined that ISIL represents a threat to international peace and security, has unequivocally condemned the gross and systematic abuses of human rights by ISIL and has stressed the need to bring perpetrators, including foreign terrorist fighters, to justice, but has failed to take more decisive action or to refer the situation to the International Criminal Court.

12. The United Nations human rights bodies, including the Human Rights Council, the Office of the United Nations High Commissioner for Human Rights (OHCHR) and the treaty bodies, as well as special procedures mandate holders, have addressed various aspects of the situation in Iraq and the Syrian Arab Republic, including ISIL. The present report aims to contribute to this work by addressing the human rights issues linked to the actions carried out by ISIL, the adequacy of the response of the Security Council and the civilian impact of the military action taken by States engaged in combating ISIL.[3]

A. Background

13. The origins of ISIL can be traced back to the immediate aftermath of the conflict in Iraq in 2004, when Al-Qaida in Iraq was established by Abu Musab al-Zarqawi. Sectarian, ethnic and religious discrimination had been rife in Iraq. However, the new Government and the "de-Baathification" of public service were clear indications that despite new power arrangements, divides along sectarian lines would continue in the post-conflict context. This was heavily exploited by Al-Qaida in Iraq and by its successor, the Islamic State of Iraq (ISI), which was founded following the death of Al-Zarqawi in 2006.

14. In 2010, ISI appointed Abu Bakr al-Baghdadi as its new leader. Under his leadership, ISI regrouped and became increasingly organized. In 2011, with the Syrian Arab Republic descending into violence, ISI sent a number of operatives to join local radical militants in the Syrian Arab Republic. The Jabhat al-Nusra armed group was formed. In April 2013, Al-Baghdadi announced the merger of ISI and Jabhat al-Nusra into the Islamic State in Iraq and the Levant. Following a power struggle between the leader of Jabhat al-Nusra and the leader of ISI, the two groups formally split, with Jabhat al-Nusra affiliating itself to Al-Qaida, and the formal disavowal of ISIL by Al-Qaida. Abu Bakr al-Baghdadi became the leader of the new armed group, ISIL, which gained control of

[1] See the report of the Independent International Commission of Inquiry on the Syrian Arab Republic entitled "Rule of terror: living under ISIS in Syria", para. 5.

[2] See the report of the Office of the United Nations High Commissioner for Human Rights on the human rights situation in Iraq in the light of the abuses committed by the so-called Islamic State in Iraq and the Levant and associated groups (A/HRC/28/18), para. 2.

[3] The Special Rapporteur wishes to express his sincere thanks to Anne Charbord, Senior Legal Adviser to the Special Rapporteur on the promotion and protection of human rights while countering terrorism, for her contribution to the preparation of the present report, and to Chris Woods, who contributed factual research for the present report.

territory in the north of the Syrian Arab Republic and Iraq previously controlled by ISI and Jabhat al-Nusra.[4]

15. Since the inception of ISIL, its priority has been the construction of a so-called State.[5] In pursuance of this goal, on 29 June 2014, the leader of ISIL renamed the group the "Islamic State" and declared it a caliphate. ISIL now controls territory in Iraq and the Syrian Arab Republic in which an estimated 8 million individuals live. At the time of writing, in Iraq, ISIL controlled swathes of territory in the provinces of Anbar, Ninewa, Salah al-Din, Kirkuk, Diyala, Babil and Erbil, with Iraqi forces making gains in several areas, notably recapturing Tikrit in April 2015. In the Syrian Arab Republic, ISIL controlled large swathes of territory in the governorates of Aleppo, Ar-Raqqah, Idlib, Al-Hasakah and Dayr Az-Zawr. It has also been reported that ISIL directly controls territory in other countries, including Libya.[6] In addition, it has been reported that several groups around the globe have pledged allegiance to ISIL,[7] and in some cases, there has been an "extension" of the territory of the caliphate.[8]

16. ISIL has consolidated its financial capacity by expanding its control over natural resources in both the Syrian Arab Republic and Iraq, notably by seizing oilfields in both countries. It has also been alleged that ISIL seized the reserves of the Iraqi Central Bank held in Mosul in June 2014. ISIL has reportedly received substantial financial support from foreign States, wealthy individuals and charitable organizations.

17. The military capacity of ISIL has continued to grow, largely as a result of looting weapons and military hardware from other Syrian armed belligerents and from the Iraqi army after its successful military campaign in Iraq. It is believed that arms and support provided to other more moderate armed groups have ultimately fallen into the hands of ISIL. ISIL has also purchased military hardware through local markets.

18. The expansion of ISIL has been helped by the inflow of foreign fighters. While figures vary, it is possible that more than 20,000 foreigners have joined the ranks of non-State armed groups in Iraq and the Syrian Arab Republic,[9] from at least 80 countries from

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[4] See "Rule of terror", para. 5; United Nations Assistance Mission for Iraq (UNAMI)/OHCHR, "Report on the Protection of Civilians in the Non International Armed Conflict in Iraq: 5 June–5 July 2014", footnote 3; Report of the Analytical Support and Sanctions Monitoring Team on The Islamic State in Iraq and the Levant (S/2014/815), paras. 1–2, 6–8 and 11–17. See also Patrick Cockburn, *The Rise of Islamic State: ISIS and the New Sunni Revolution* (London and New York, Verso Books, 2015); and Jessica Stern and J.M. Berger, *ISIS: The State of Terror* (London, William Collins, 2015).

[5] See Erin Marie Saltman and Charlie Winter, *Islamic State: The Changing Face of Modern Jihadism*, (Quilliam, 2014) and Stern and Berger, *ISIS: The State of Terror* (chap. 8).

[6] In Barqa (Cyrenaica) in the east, Fezzan in the south, and Tripolitania in the west. See Eric Schmitt and David D. Kirkpatrick, "Islamic State sprouting limbs beyond its base", *New York Times*, 14 February 2015. Available from www.nytimes.com/2015/02/15/world/middleeast/islamic-state-sprouting-limbs-beyond-mideast.html?_r=2. See also Human Rights Watch, "Libya: Extremists Terrorizing Derna Residents", 27 November 2014. Available from www.hrw.org/news/2014/11/27/libya-extremists-terrorizing-derna-residents.

[7] Boko Haram (Nigeria), Abu-Sayyaf (Philippines), Ansar Bait al-Maqdis (Egypt) and Ansar al-Sharia (Yemen), among others, have all reportedly pledged allegiance to the "Islamic State".

[8] See "Rule of terror" para. 17. On 13 November 2014, the leader of ISIL announced the expansion of the Islamic State to "new lands" (Saudi Arabia, Yemen, Egypt, Libya and Algeria) following pledges made to him by various groups active in these territories. ISIL created new provinces in these countries and appointed "governors". See Stern and Berger, *ISIS: The State of Terror*.

[9] See S/2014/815, para. 14. See also Peter R. Neumann, director of the International Centre for the Study of Radicalisation and political violence (ICSR), "Foreign fighter total in Syria/Iraq now exceeds 20,000; surpasses Afghanistan conflict in the 1980s", 26 January 2015.

all parts of the globe.[10] It is reported that most have joined the ranks of ISIL owing to its perceived success,[11] the ease with which one can join and its online presence and propaganda.[12] The proclamation by its leader of ISIL as a caliphate[13] has reportedly galvanized support from radicalized individuals and groups around the world. Individuals join ISIL not only to fight, but also to assist in the building of a "State", with ISIL promoting a sense of religious duty,[14] attracting individuals from diverse backgrounds.[15] Many of these recruits are reportedly experienced fighters, or have the ability to attract others through propaganda.[16] Foreign nationals play a prominent role in the religious, educational and judiciary "systems" of ISIL, which further radicalizes communities under its authority.[17] It has been reported that the military leadership structures of ISIL are largely dominated by foreign fighters.[18]

19. ISIL has consolidated its control over the populations in the territory it holds. By taking advantage of the instability in both Iraq and the Syrian Arab Republic,[19] its ideology and financial capabilities have found resonance among socially and economically desperate communities. It has exploited the existing social fragmentations among sectarian and tribal lines to secure a new network of alliances.[20] Most importantly, through the use of tactics that instil terror in the population, including the calculated use of public brutality and indoctrination, as well as the establishment of monopolistic control over basic services, ISIL has ensured the submission of the communities under its control.[21]

20. ISIL is an organized group[22] that functions under a formalized command with an essentially vertical and hierarchical command structure.[23] It is composed of an armed force, an administrative wing and a religious wing, all under the control of the self-proclaimed caliph, Al-Baghdadi.[24] It operates a harsh, rigid administrative system that is based on provinces and comprises the Al-Hisbah morality police, the general police force, courts and entities managing recruitment, tribal relations and education.[25]

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[10] See Richard Barrett, *Foreign Fighters in Syria* (New York, The Soufan Group, 2014). See also S/2014/815, para. 87.

[11] See S/2014/815, para. 14.

[12] See Saltman and Winter, *Islamic State*.

[13] See "It ain't half hot here, mum: why and how Westerners go to fight in Syria and Iraq", *The Economist*, 30 August 2014.

[14] See Stern and Berger, *ISIS: The State of Terror*.

[15] See "Rule of terror", paras. 17 and 29. See also Stern and Berger, *ISIS: The State of Terror*, which notes that in an article in *Dabiq*, the online English-language magazine of ISIL, it asked for doctors, engineers, scholars and people with military, administrative and service expertise.

[16] See Saltman and Winter, *Islamic State*.

[17] See the report of the Independent International Commission of Inquiry on the Syrian Arab Republic (A/HRC/28/69), para. 127.

[18] See "Rule of terror" paras. 12 and 13.

[19] See S/2014/815, para. 8.

[20] See "Rule of terror", para. 9.

[21] Ibid., para. 1, and A/HRC/28/69, para. 35.

[22] See British Broadcasting Corporation, "UK paying experts to build Islamic State war crimes case", 3 September 2014. Available from www.bbc.co.uk/news/world-middle-east-29052475.

[23] See "Rule of terror", para. 13.

[24] See S/2014/815, paras. 13–17.

[25] See A/HRC/28/69, para. 36.

B. Legal framework

21. The Special Rapporteur has previously recalled the criteria for the existence of armed conflicts of a non-international character,[26] namely the intensity and protraction of the conflict and the degree of organization of the parties. It is generally accepted that ISIL is a sufficiently organized non-State armed group to be considered as a party to the non-international armed conflicts in Iraq and the Syrian Arab Republic,[27] and that the situations in both countries amount to armed conflicts of a non-international character.[28]

22. International humanitarian law applicable to armed conflicts of a non-international character is applicable in both Iraq and the Syrian Arab Republic.[29] All parties to the conflict, including ISIL, are therefore bound by common article 3 of the Geneva Conventions, which establishes minimum standards concerning the treatment and protection of civilians, those no longer actively participating in the hostilities and civilian objects. They are also bound by the customary law norms contained in the protocol additional to the Geneva Conventions of 12 August 1949 relating to the protection of victims of non-international armed conflicts.

23. In addition, it is now well established that in a situation of armed conflict, international human rights law continues to apply, and both international human rights law and international humanitarian law frameworks will act in a complementary and mutually reinforcing way.[30] Both Iraq and the Syrian Arab Republic are parties to the major human rights treaties and a number of optional protocols.[31]

C. Human rights and humanitarian law violations attributable to the Islamic State in Iraq and the Levant

24. The Independent International Commission of Inquiry on the Syrian Arab Republic, established on 22 August 2011 by Human Rights Council resolution S-17/1, the United Nations Assistance Mission for Iraq and OHCHR,[32] as well as a number of non-

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[26] See the Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism (A/68/389), para. 63. See also International Committee of the Red Cross, "How is the term 'armed conflict' defined in international humanitarian law?", opinion paper, March 2008. Available from www.icrc.org/eng/assets/files/other/opinion-paper-armed-conflict.pdf. See also International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991, case No. IT-94-1-A, *Prosecutor v. Duško Tadic*, para. 70, and case No. IT-04-84-T, *Prosecutor v. Ramush Haradinaj et al*, paras. 49 and 60.

[27] See A/68/389, para. 66.

[28] For Iraq, see A/HRC/28/18, para. 13. For the Syrian Arab Republic, see A/HRC/28/69, para. 1. In his report on the implementation of Security Council resolutions 2139 (2014) and 2165 (2014), the Secretary-General referred to a "complex, protracted regional conflict" (see S/2014/756, para. 58).

[29] Neither Iraq nor the Syrian Arab Republic have acceded to the protocol additional to the Geneva Conventions of 12 August 1949, and relating to the protection of victims of non-international armed conflicts. They are also not parties to the Rome Statute of the International Criminal Court.

[30] For an overview of the legal framework applicable in the Syrian Arab Republic, see the report of the independent international commission of inquiry on the Syrian Arab Republic (A/HRC/21/50), annex 2.

[31] For a full list, for Iraq, see UNAMI/OHCHR, "Report on the Protection of Civilians in the Non International Armed Conflict in Iraq: 5 June–5 July 2014", p. 6; for the Syrian Arab Republic, see A/HRC/21/50, annex 2, para. 8.

[32] See A/HRC/28/18 and UNAMI/OHCHR "Report on the Protection of Civilians in the Non International Armed Conflict in Iraq: 5 June–5 July 2014".

governmental organizations, have extensively investigated and documented grave and systematic violations of international law by ISIL that could amount to genocide, crimes against humanity, war crimes and gross human rights violations,[33] including widespread and systematic attacks on the civilian population.[34]

25. It has been reported that ISIL has specifically targeted religious and ethnic groups in both Iraq and the Syrian Arab Republic and has committed acts of violence against civilians because of their affiliation or perceived affiliation to an ethnic or religious group.[35] Where ISIL has occupied areas with diverse religious and ethnic communities, minorities[36] have been forced to assimilate or flee, ISIL imposing disciplinary sanctions, destroying religious sites and carrying out systematic expulsions. In Iraq, there are reports of a pattern of violence against the Yezidis and, specifically, of men being separated from women and young children, then taken to ditches and summarily executed.[37] It has been reported that at least 700 men were killed in August 2014 after being rounded up, separated from the women and forced to convert. Those who refused were taken to a farm and, after being made to hand over their possessions, were ordered to lie face down on the ground and were filmed by members of ISIL before being shot several times.[38] These acts may, if confirmed, amount to genocide[39] as defined in the Convention on the Prevention and Punishment of the Crime of Genocide. Other acts, including summary executions,[40] abductions on a mass scale[41] and forced conversions, may amount to crimes against humanity and war crimes. In the Syrian Arab Republic, it has been reported that ISIL may have committed a crime against humanity by forcibly displacing the Kurdish population in Ar-Raqqah governorate.[42]

26. The alleged responsibility of ISIL for unlawful killings, including massacres,[43] has also been reported.[44] Summary executions and enforced disappearances of individuals ISIL views as challenging its dominance or opposing it, through a policy of declaring them to be heretics or infidels in order to justify the attacks, has also been widely documented in the Syrian Arab Republic[45] and in Iraq.[46] Individuals targeted include police officers, public servants, members of parliament, tribal and religious leaders, election candidates and hors de combats fighters. Sometimes, individuals are found guilty by ISIL "courts" before being executed,[47] in the absence of any due process. In an effort to control the flow of information and limit freedom of expression, journalists and human rights defenders have been

[33] See A/HRC/28/18, para. 76, and "Rule of terror", paras. 74, 77 and 78.
[34] See, for example, A/HRC/28/69, para. 75.
[35] See A/HRC/28/18, para. 16.
[36] Ibid., para. 16, and "Rule of terror", paras. 24–31.
[37] See A/HRC/28/18, para. 18.
[38] Ibid., para. 19.
[39] Ibid., para. 16.
[40] Ibid., paras. 19 and 28.
[41] Ibid., paras. 16–20.
[42] See "Rule of terror", para. 29.
[43] In October 2013, the Commission of Inquiry adopted the following working definition of a massacre: "an intentional mass killing of civilians not directly participating in hostilities, or hors de combat fighters, by organized armed forces or groups in a single incident, in violation of international human rights or humanitarian law". See A/HRC/28/69, annex II, para. 1.
[44] See A/HRC/28/69, annex II, paras. 21–30.
[45] Ibid., annex II, paras. 21–30 and 68–79. See also "Rule of terror", para. 32.
[46] See, for example, A/HRC/28/18, paras. 29–34.
[47] See UNAMI/OHCHR, "Report on the Protection of Civilians in Armed Conflict in Iraq: 11 September–10 December 2014", p. 10.

summarily executed, abducted, made to disappear and tortured.[48] There are also scores of allegations of torture and ill-treatment of individuals in detention centres, as well as summary punishments for theft, watching football matches, smoking, improper attire, not attending Friday prayers and having tattoos,[49] in breach of ISIL edicts.

27. ISIL has been particularly brutal and discriminatory against women. Information collected indicates that, in addition to confining women largely to their homes and dictating what they must wear, with whom they may socialize and where they may work,[50] ISIS elements have committed sexual and gender-based violence, which may constitute war crimes and amount to crimes against humanity. It is reported that Yezidi women in particular have been the target of killings, widespread and systematic enslavement, including sexual slavery, and rape; women have also been sold and forcibly transferred[51] from northern Iraq to areas under ISIL control in the Syrian Arab Republic, where many remain in captivity.[52] There are also credible reports about the rape of girls as young as 6 years old.[53] The targeting of homosexual men on the basis of their sexuality has also been highlighted.

28. The abuse and violence perpetrated by ISIL against children has been widely documented.[54] This includes summary executions, arbitrary detention, torture, cruel and inhuman treatment and kidnapping. In a particularly disturbing development, education is being used as a tool for indoctrination.[55] Children are reportedly made to watch videos of beheadings[56] and mass executions to desensitize them to forms of violence employed by ISIL. The existence of "cub camps" in which children are taught to use weapons and trained to be deployed as suicide bombers has been reported,[57] and children have been used as executioners. It is also reported that children as young as 8, and possibly 5, have been trained and used in active combat roles. If true, this would constitute a war crime and a violation of the Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict.

29. In summary, ISIL has engaged in widespread and systematic human rights and humanitarian law violations of the most serious kinds.[58] Such violations have been most thoroughly documented in connection with ISIL actions in the Syrian Arab Republic by the Independent International Commission of Inquiry, but have also been widely reported by reliable sources in Iraq. The methods used include public beheadings, shootings, stoning,[59] amputations and lashings, with individuals urged to attend executions, following which the corpses are placed on public display, often on crosses, for up to three days.[60] In addition, victims' heads have been placed on spikes alongside park railings, in squares and on the

[48] See "Rule of terror", paras. 39–42, and A/HRC/28/69, paras. 82–83.
[49] See A/HRC/28/18, para. 49, and A/HRC/28/69, annex 2, paras. 67–91 and 159.
[50] See "Rule of terror", paras. 47 and 48, and A/HRC/28/69, para. 187.
[51] See A/HRC/28/18, paras. 35–43.
[52] See A/HRC/28/69, paras. 185–188.
[53] See A/HRC/28/18, para. 40.
[54] See "Rule of terror", paras. 58–62; A/HRC/28/69, paras. 205–213; and A/HRC/28/18, paras. 44–46.
[55] See "Rule of terror", para. 60.
[56] See A/HRC/28/69, para. 207.
[57] Ibid., para. 70.
[58] See "Rule of terror", para. 77.
[59] Ibid., para. 32.
[60] Ibid., para. 36. See also the reports of the Independent International Commission of Inquiry on the Syrian Arab Republic (A/HRC/27/60) paras. 30–38 and 65–74, and A/HRC/25/65, paras. 25–33 and 57–61. In each case, it would be necessary to determine that the victims were civilians and not members of other armed groups.

roundabouts of the larger towns.[61] The displaying of mutilated bodies serves as a warning to the local population of the consequences of failure to submit to the armed group's authority,[62] to deter those who may oppose the group's rule and to spread terror among the population.[63] The attacks perpetrated by ISIL on churches and historic monuments that do not represent military targets are apparently committed to enforce religious and ideological hegemony and to instil fear in minority populations.[64] The systematic and targeted assassination and abduction of community, political and religious leaders, government employees, education professionals, journalists and health workers[65] also appear to be aimed at demonstrating the supremacy of ISIL in areas it controls. The brutal nature and overall scale of abuses appears to be intended to reinforce the group's absolute monopoly on political and social life and to enforce compliance and conformity among communities under its control.[66] The result is that civilians who remain in ISIL-controlled areas live in a state of constant and almost unimaginable fear.[67]

30. Some still argue that human rights, as a body of law, can only bind States, and cannot or should not apply to non-State armed groups. However, as the Special Rapporteur has previously highlighted in other contexts, a central tenet of international human rights law is that it must keep pace with a changing world. Human rights apply at all times, inherently belong to individuals and are key to individual dignity. Increasingly, non-State armed groups control parts of territories in which populations live. This is the case with ISIL, which now controls large swathes of territory in which millions of individuals live; it has declared itself a "State", and runs both a civil and a military administration, including the establishment of a "court" system. The threshold for ISIL to be bound by human rights obligations has clearly been met.[68] This means, at a minimum, that ISIL is bound under international law to respect core human rights obligations, such as the right to life, the absolute prohibition of torture, cruel, inhuman and degrading treatment, the prohibition of slavery and the prohibition of enforced disappearance, as well as the right to freedom of thought, conscience and religion.

31. In addition, where ISIL engages in violations that are unrelated to the conflict and not direct consequences of it, the governing legal framework should be international human rights law. In practice, this means that ISIL is legally bound to respect freedom of expression, freedom of assembly and freedom of movement. These rights should be protected without discrimination on any of the grounds prohibited by international law. The right to a fair trial should also be guaranteed. In areas of substantive overlap between international human rights and international humanitarian law, the principles that provide assistance in determining which framework is applicable are those of *lex specialis*[69] and effective control: the more effective control ISIL has over a territory or individuals, the

[61] See "Rule of terror", paras. 33–35.
[62] Ibid., para. 33.
[63] Ibid., para. 21.
[64] Ibid., para. 31.
[65] See UNAMI/OHCHR "Report on the Protection of Civilians in Armed Conflict in Iraq: 6 July–10 September 2014", pp. 5–8.
[66] See "Rule of terror", para. 30.
[67] Ibid., para. 19.
[68] See the statement by the President of the Security Council on the situation in Iraq (S/PRST/2014/20), p. 2, and Security Council resolution 2170 (2014), para. 3.
[69] See "Fragmentation of international law: difficulties arising from the diversification and expansion of international law – Report of the Study Group of the International Law Commission" (A/CN.4/L.682 and Corr.1), paras. 56–57.

greater is the extent to which human rights law will constitute the appropriate legal framework.[70]

D. Accountability

32. As the Security Council recalled in its resolution 2170 (2014), accountability for all gross or serious violations of international human rights law and international humanitarian law is essential to ensure justice, provide redress to the victims and prevent future violations. The Governments of Iraq and the Syrian Arab Republic bear primary responsibility for protecting persons under their jurisdiction and ensuring accountability for the commission of grave crimes. This implies a duty to take action so that violations are prevented, stopped and not repeated; to investigate alleged violations effectively, promptly, thoroughly and impartially and, where required, to bring alleged perpetrators to justice in accordance with domestic and international law; and to provide adequate remedy and redress to victims. Domestic courts in Iraq and the Syrian Arab Republic have jurisdiction over all violations committed in their territories, whether by nationals or foreigners, and they should exercise their jurisdiction where it is possible to do so.

33. However, in the light of the operational obstacles to the effective exercise of jurisdiction, and bearing in mind concerns regarding respect for the right to a fair trial that have been expressed regarding the judicial systems in both Iraq[71] and the Syrian Arab Republic,[72] the involvement of the International Criminal Court or the creation of an ad hoc international tribunal to investigate and prosecute the crimes allegedly committed by, inter alia, ISIL must be regarded as a priority.[73] The Special Rapporteur joins the call made by the United Nations High Commissioner for Human Rights, the Independent International Commission of Inquiry on the Syrian Arab Republic and others for the involvement of the International Criminal Court regarding the situation in both Iraq and the Syrian Arab Republic. The failure of the Security Council to refer the situation in the Syrian Arab Republic to the Court has contributed to crimes continuing to be committed unabated.[74] As neither Iraq nor the Syrian Arab Republic are parties to the Rome Statute, the Court has no territorial jurisdiction over crimes committed on their soil. The Prosecutor of the Court has reviewed those cases in which the Court could exercise personal jurisdiction over alleged perpetrators who are nationals of a State party to the Rome Statute, but has said that the prospects of the Court investigating and prosecuting those with most responsibility in the ISIL leadership would be remote.[75] In the absence of a Security Council resolution referring the situation to the Court, the Special Rapporteur calls on the Governments of Iraq and the

[70] See *International legal protection of human rights in armed conflict* (United Nations publication, Sales No. E.11.XIV.3), p. 63. On the alleged violations, see, for example, the reports of the Independent International Commission of Inquiry on the Syrian Arab Republic (A/HRC/21/50), para. 134, and A/HRC/25/65, para. 129; "Rule of terror", para. 20; UNAMI/OHCHR, "Report on the Protection of Civilians in Armed Conflict in Iraq: 6 July–10 September 2014", p. 11; and A/HRC/28/18, paras. 48 and 49.

[71] See UNAMI/OHCHR, "Report on Human Rights in Iraq: January–June 2014".

[72] See A/HRC/28/69, paras. 103–105.

[73] Ibid., para. 146 (b).

[74] On 22 May 2014, despite the backing of 13 of its members, the Security Council was unable to adopt a resolution that would have referred the situation in the Syrian Arab Republic to the International Criminal Court as a result of vetoes by two permanent members, China and the Russian Federation.

[75] See the statement of the Prosecutor of the International Criminal Court, Fatou Bensouda, on the alleged crimes committed by ISIS, 8 April 2015. Available from www.icc-cpi.int/en_menus/icc/press%20and%20media/press%20releases/Pages/otp-stat-08-04-2015-1.aspx.

Syrian Arab Republic to become parties without delay to the Rome Statute and to accept the jurisdiction of the Court over the current situation under article 12 (3).

34. In addition, where it is suspected that returning foreign fighters have committed war crimes or international crimes, courts in the countries of nationality of those fighters should exercise extraterritorial jurisdiction for the crimes committed, where it is available under national law.[76] As recommended by the Independent International Commission of Inquiry on the Syrian Arab Republic, the principle of universal jurisdiction should be used in accordance with national law to investigate and prosecute persons and groups implicated in egregious violations.[77] In this respect, the Special Rapporteur takes note of the decision of the Commission to share information with States willing to exercise their jurisdiction over the crimes committed in the Syrian Arab Republic.[78] As noted by the Commission, every measure should be taken to ensure that individuals responsible for serious violations of international law are held to account.[79]

E. Response of the Security Council

35. As the Security Council was unable to reach consensus on the issue of accountability for international crimes, it has focused on ISIL as a terrorist group. ISIL has been included in the Council's comprehensive international counter-terrorism framework, which was adopted under Chapter VII of the Charter of the United Nations and Statute of the International Court of Justice, and is legally binding on all States Members of the United Nations, following a determination that international terrorism associated with Al-Qaida represents a threat to international peace and security. In addition, the Council has taken measures relating to "foreign terrorist fighters".

36. On 30 May 2013, the Security Council added ISIL to the Al-Qaida Sanctions List as an alias for Al-Qaida in Iraq (QE.J.115.04). As the Council makes clear in its resolution 1989 (2011), any individual or entity designated by the Security Council Sanctions Committee as associated with Al-Qaida, which includes any form of support for the activities of Al-Qaida, or any cell, affiliate, splinter group or derivative thereof, may be listed. Despite the fact that ISIL has severed its ties with Al-Qaida, the Council considers it a splinter group of Al-Qaida.[80]

37. As a consequence of this listing, ISIL is subject to the threefold sanctions regime imposed by the Security Council, namely: assets freeze, travel ban and arms embargo. In addition, the Council, in its resolution 2170 (2014), specifically indicates that individuals, groups, undertakings and entities that provide support to ISIL, broadly described as those financing, arming, planning or recruiting for ISIL through information and communications technologies, including the Internet and social media, can also be listed on the Al-Qaida Sanctions List and be subject to the same sanctions.[81]

38. The Special Rapporteur has already provided a comprehensive overview of the various shortcomings of the sanctions regime that the United Nations has established with regard to Al-Qaida, in particular the quasi-legislative and quasi-judicial functions performed by the Security Council in administering the regime, in the absence of

[76] Report of the United Nations High Commissioner for Human Rights on the protection of human rights and fundamental freedoms while countering terrorism (see A/HRC/28/28, para. 44).

[77] See A/HRC/28/69, para. 145 (a).

[78] Ibid., paras. 106–107.

[79] Ibid., para. 145 (a).

[80] See Security Council resolution 2170 (2014), para. 18.

[81] Ibid., para. 18.

independent judicial review that can deliver an effective remedy at the level of the United Nations (see A/67/396). While acknowledging the significant improvements brought to the regime,[82] concerns remain that most of the shortcomings that had been identified still remain valid and that the regime continues to fall short of international minimum standards of due process. In particular, the Ombudsperson's comprehensive reports are still not legally binding; the process still lacks transparency; the Ombudsperson still has limited access to confidential information, a challenge she describes as the most significant limitation to the effectiveness of the Ombudsperson process; and the institutional arrangements for the Office of the Ombudsperson still do not afford it proper safeguards for independence.[83]

39. The Security Council has also taken decisive action against ISIL through a number of subsequent resolutions adopted under Chapter VII of the Charter of the United Nations. In its resolution 2170 (2014), the Council condemned in the strongest terms the terrorist acts of ISIL and its continued gross, systematic and widespread abuses of human rights and violations of international humanitarian law. The Council emphasized the need to ensure that ISIL is held accountable for abuses of human rights and violations of international humanitarian law and stressed the need to bring to justice those within ISIL who commit terrorist acts, as well as foreign terrorist fighters. Recalling that threats to international peace and security caused by terrorist acts must be combated in accordance with international law, including international human rights and humanitarian law, it adopted a number of measures and sanctions to prevent the financing of ISIL, including revenues generated from control of oilfields and related infrastructure, kidnapping for ransom and donations.[84]

40. The threat posed by the influx of foreign fighters, albeit not a new phenomenon,[85] has gained increasing prominence in the context of the armed conflicts in Iraq and the Syrian Arab Republic. With States intent on preventing the ranks of ISIL from growing and exacerbating the conflict, as well as on preventing returning nationals from carrying out attacks on their own soil (so-called "blowback" attacks) or further radicalizing their nationals, the Security Council took decisive action to address the issue of foreign fighters.

41. As already noted, in its resolution 2170 (2014) the Security Council called upon Member States to take national measures to suppress the flow of foreign terrorist fighters joining ISIL and other individuals, groups and entities associated with Al-Qaida in Iraq and the Syrian Arab Republic. In its resolution 2178 (2014), the Council went further, requiring States to adopt a number of measures regarding foreign terrorist fighters, defined as "individuals who travel to a State other than their States of residence or nationality for the purpose of the perpetration, planning, or preparation of, or participation in, terrorist acts or the providing or receiving of terrorist training, including in connection with armed conflict". In that resolution, the Council decided that Member States should prevent the travel of foreign terrorist fighters, that they should bring them to justice and that they should criminalize a number of actions linked to such fighters concerning travel and its funding and organization or facilitation of recruitment.

[82] See Security Council resolutions 1904 (2009), 1989 (2011), 2083 (2012) and 2161 (2014).

[83] See S/2015/80, paras. 37–53.

[84] See Security Council resolution 2199 (2015), which builds on resolution 2170 (2014) by refining the range of tools available to block the financing of ISIL.

[85] See Geneva Academy of International Humanitarian Law and Human Rights, "Foreign fighters under international law", Geneva Academy Briefing No. 7 (Geneva, Geneva Academy, 2014).

42. Resolution 2178 (2014) includes a specific and comprehensive human rights clause.[86] Significant concerns have nonetheless been expressed concerning the broad nature of some of the provisions and the lack of definition of the terms "terrorism" or "extremism", which, on the basis of past experience, may lead some Governments to use the resolution to justify repressive measures against political dissenters with the apparent endorsement of the Security Council.[87] Similarly, the standard adopted for enforcement action, that is, credible information that the individual will engage in the acts set out in the resolution, arguably provides too much latitude to States and could result in arbitrary enforcement action being taken.

43. In the same resolution, the Security Council also calls upon Member States to require airlines to provide advance passenger information to the appropriate national authorities in order to detect when individuals who may fall under the definition of foreign terrorist fighters are travelling by civilian aircraft. While it is clear from the language of the resolution that this should not be done by resorting to profiling based on stereotypes founded on grounds of discrimination prohibited under international law, well-founded concern has been expressed about the practical implementation of the resolution, as it may have a serious impact on a person's right to privacy. Measures that interfere with the right to privacy must be authorized by domestic law that is accessible and precise and that conforms to the requirements of the International Covenant on Civil and Political Rights. Those measures must also pursue a legitimate aim and they must meet the tests of necessity and proportionality.[88]

44. In the view of the Special Rapporteur, the approach adopted by the Security Council to the phenomenon of foreign terrorist fighters could create legal uncertainty in efforts to identify those to whom it is intended to apply, whether to members of all non-State armed groups or those defined as terrorist groups under national law, international law, or both. The Council stresses the urgent need to implement these measures with respect to those fighters associated with ISIL, among others. However, the scope of the resolution is not limited to foreign fighters directly associated with ISIL but, rather, depends on national implementing measures. The Special Rapporteur considers that States should ensure that, in implementing resolution 2178 (2014), they ensure that national measures are applied only to those individuals who are conclusively shown to meet the criteria laid down by the Council. They should also ensure that they strictly observe the human rights provisions contained within the resolution itself, which include the right to independent and impartial adjudication and adequate due process, and, more broadly, the principle of legality enshrined in article 15 of the International Covenant on Civil and Political Rights.[89] Criminal liability, including any definition provided in the law, must be precisely framed and must respect the principle of legal certainty.

45. A number of other rights may also be affected by national measures to implement the resolution.[90] Measures such as the seizure and retention of passports or identity cards

[86] See General Assembly resolution 60/288.

[87] See A/HRC/28/28, paras. 46 and 47. See also Martin Scheinin, "Back to post-9/11 panic? Security Council resolution on foreign freedom fighters", *Just Security*, 23 September 2014, available from http://justsecurity.org/15407/post-911-panic-security-council-resolution-foreign-terrorist-fighters-scheinin/, and "A Comment on Security Council Res 2178 (Foreign Terrorist Fighters) as a 'Form' of Global Governance", *Just Security*, 6 October 2014, available from http://justsecurity.org/15989/comment-security-council-res-2178-foreign-fighters-form-global-governance/.

[88] See A/69/397 and the report of OHCHR on the right to privacy in the digital age (A/HRC/27/37).

[89] See A/HRC/28/28, paras. 48 and 49.

[90] Ibid., paras. 49 and 50.

may affect freedom of movement; the stripping of citizenship can affect the prohibition of arbitrary deprivation of nationality or the absolute prohibition of refoulement; restrictions on travel, or bans from entering one's country, can affect the right to work, to a family life and to health; and various types of house arrests or preventive detention can affect the right to safety and security. The right to a fair trial can be adversely affected by preventive measures, such as those that limit freedom of movement or touch upon the right to a nationality and are adopted by members of the executive, based on classified information, without the opportunity for adequate independent judicial review.

F. Impact on civilians of the military response to the Islamic State in Iraq and the Levant

46. On 8 August 2014, the United States of America carried out air strikes against ISIL positions close to Erbil in Iraq. On 23 September 2014, military action against ISIL started in the Syrian Arab Republic. The international coalition of States led by the United States against ISIL includes over 60 partners,[91] with various levels of involvement, from carrying out air strikes to providing advice. The States involved in the coalition are different in Iraq and in the Syrian Arab Republic, with some States active in only one or the other.[92] By 27 March 2015, the coalition had reported over 3,000 air strikes in which more than 11,000 munitions had been released. The United States has been responsible for 92 per cent of the coalition air strikes in the Syrian Arab Republic and 70 per cent of the coalition air strikes in Iraq.

47. According to the Government of the United States, the legal basis for the coalition's use of force in Iraq is intervention by invitation, or consent. On 18 June 2014, at a hearing of the United States Senate Appropriations Defense Subcommittee, the Chairman of the Joint Chiefs of Staff, General Martin Dempsey, informed the Subcommittee that the Government of Iraq had requested United States military air strikes to help combat violence in Iraq led by ISIL.[93] This request for assistance by the Government of Iraq is solid legal ground on which to determine the legality of the air strikes that take place on Iraqi territory.[94]

48. As the Government of the Syrian Arab Republic did not explicitly provide consent for air strikes against ISIL on its territory, the legal basis for the use of force on Syrian territory lies elsewhere. On 20 September 2014, the Minister for Foreign Affairs of Iraq sent a letter to the President of the Security Council in which he explained that ISIL had established a safe haven outside Iraqi borders that was a direct threat to the security of the people and territory of Iraq (see S/2014/691, annex). He also explained that Iraq had requested the United States to lead international efforts to strike ISIL sites and military strongholds with the express consent of Iraq. On 23 September 2014, in a letter to the Secretary-General, the Permanent Representative of the United States referred to the

[91] See www.state.gov/s/seci/index.htm.

[92] Some of the key actors in Iraq and the Syrian Arab Republic are: the United States, Canada, Jordan, Morocco and the United Kingdom, with intelligence-only flights in the Syrian Arab Republic; in Iraq: Australia, Belgium, France, the United Kingdom, the Netherlands and Denmark; in the Syrian Arab Republic: Bahrain, Saudi Arabia, the United Arab Emirates and Qatar.

[93] See Andrew Marszal and Arron Merat, "Iraq crisis: June 18 as it happened", *The Telegraph*, 18 June 2104. Available from www.telegraph.co.uk/news/worldnews/middleeast/iraq/10908057/Iraq-crisis-Isis-launch-overnight-attack-on-Iraqs-biggest-oil-refinery-live.html.

[94] See Claus Kreß, "The fine line between collective self-defense and intervention by invitation: reflections on the use of force against "IS" in Syria", *Just Security*, 17 February 2015. Available from http://justsecurity.org/20118/claus-kreb-force-isil-syria/.

serious threat faced by Iraq of continuing attacks from ISIL coming from safe havens in the Syrian Arab Republic (S/2014/695). She noted that "States must be able to defend themselves, in accordance with the inherent right of individual and collective self-defence ... when, as is the case here, the government of the State where the threat is located is unwilling or unable to prevent the use of its territory for such attacks". She also said that the United States had initiated necessary and proportionate military action in the Syrian Arab Republic in order to eliminate the ongoing ISIL threat to Iraq, including by protecting Iraqi citizens from further attacks and by enabling Iraqi forces to regain control of Iraqi borders.

49. The right to self-defence as an exception to the absolute prohibition on the use of force is enshrined in article 51 of the Charter of the United Nations and is contingent on a State facing an imminent risk of an armed attack on its territory. Under orthodox principles of international law, the use of force against an armed group located on the territory of another State is only justified on grounds of self-defence if the territorial State consents, if the actions of the group concerned are legally imputable to the territorial State or if the territorial State is harbouring the armed group concerned. International law may also recognize a right of cross-border pursuit where an armed group uses the territory of a bordering State as a place to which to retreat in order to regroup before recrossing the border for the purpose of returning to engage in armed conflict. In the absence of such a connection, however, the extraterritorial use of force against a non-State armed group located on the territory of another State has traditionally been regarded as a violation of sovereignty.

50. However, as the Special Rapporteur has previously noted,[95] some States are now taking the view that the right to self-defence can be exercised even where the non-State armed groups have no operational connection with the host State. States adopting this analysis hold that if, after a reasonable opportunity, the territorial State has failed effectively to neutralize a threat that emanates from an armed group operating within its borders, either because it is unable or unwilling to do so, then the State that is threatened with attack is entitled under the law of self-defence to cross the territorial State's borders and use military force in self-defence against the group that presents the threat. As the Permanent Representative of the United States noted in her letter to the Secretary-General, "the Syrian regime has shown that it cannot and will not confront these safe havens [used by ISIL for training, planning, financing, and carrying out attacks across Iraqi borders and against Iraqi people] effectively itself". On this analysis, the United States and its coalition partners are entitled to use force in the Syrian Arab Republic at the request of Iraq in order to defend Iraq and its people against attacks by ISIL, which is operating in Iraq but is using Syrian territory for the purpose of planning and preparing its military operations, and they are entitled to enter Syrian territory for this purpose because the Government of the Syrian Arab Republic has shown itself unable or unwilling to deal with the threat emanating from ISIL.

51. Many of the 8 million Iraqis and Syrians who live in ISIL-controlled territory live in urban areas. It has been reported, in Iraq and the Syrian Arab Republic, that ISIL deliberately places its fighters among civilians or in civilian areas, or uses civilian infrastructure, such as schools and hospitals, as military bases to conduct operations and shield its fighters from attack, or to ensure civilian casualties in the event of attack.[96] Major towns have been frequently targeted by coalition air strikes, for example the heavy

[95] See A/68/389, paras. 56–57.

[96] See OHCHR/UNAMI, "Report on the Protection of Civilians in Armed Conflict in Iraq: 11 September–10 December 2014", pp. 10 and 17.

bombing of central Tikrit.[97] Basing forces among civilians and civilian infrastructure constitutes a serious violation of applicable standards of international humanitarian law and can constitute a war crime. At the same time, however, international humanitarian law is clear that direct attacks against civilian objects are prohibited,[98] unless and for such time as they are military objectives.[99] There is a presumption of civilian character for objects normally dedicated to civilian purposes. In case of doubt, the principle of distinction and the requirement to do everything feasible to verify that targets are military objectives, not civilian objects, prevail.[100]

52. Accurate targeting can be a particular challenge in such an environment. Obtaining accurate intelligence is essential, but it has been reported that only 25 per cent of coalition air strikes in the Syrian Arab Republic, and 5 per cent in Iraq, are pre-planned.[101] With few personnel on the ground to provide accurate targeting, crews rely heavily on targets of opportunity. In recognition of this more challenging environment, the United States has confirmed that the recent high standards it demanded of its drone strikes in Pakistan, which required "a near certainty" that civilians would not be killed, could not apply to Iraq or the Syrian Arab Republic given the intense nature of the conflict.[102] In such circumstances, the coalition has a particular need for good aerial intelligence, surveillance and reconnaissance. This would not only allow planners to scout potential targets, but also to conduct battle damage assessments in the wake of strikes to gauge their effect on local populations, and so modify tactics accordingly.

53. The accurate identification of those directly participating in hostilities is critical to a proper application of the principles of distinction, proportionality and precaution. The Special Rapporteur recalls that there is a lack of international consensus on the rules governing direct participation in hostilities.[103] According to the International Committee of the Red Cross, an individual may be considered as a member of a non-State armed group, and therefore targeted at any time, only if they have assumed a "continuous combat function" within that group.[104] If this criterion is not met, an individual who is otherwise affiliated with an armed group can be regarded as having protected civilian status and may be targeted with deadly force only if, and so long as, the individual is playing a direct part in the conduct of hostilities. States that are involved in the military action in both Iraq and the Syrian Arab Republic, including those States carrying out air strikes, should disclose the criteria they adopt for direct participation in hostilities. This is critical to achieving transparency as to the forms of conduct that may expose civilians to deadly force, to evaluating whether any attack is lawful under international law, and for evaluating the number of civilian casualties resulting from an attack.

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[97] See United States Department of Defense, "Coalition Forces Conduct 17 Airstrikes in Tikrit", 26 March 2015. Available from www.defense.gov/news/newsarticle.aspx?id=128458.

[98] See International Committee of the Red Cross (ICRC), Customary International Humanitarian Law, rule 8.

[99] Ibid., rule 10.

[100] Ibid., rule 16.

[101] See Eric Schmitt, "U.S. Adds Planes to Bolster Drive to Wipe Out ISIS", *New York Times*, 26 November 2014. Available from www.nytimes.com/2014/11/27/us/us-adds-air-power-but-isis-presents-elusive-target.html.

[102] See Michael Isikoff, "White House exempts Syria airstrikes from tight standards on civilian deaths", 30 September 2014. Available from https://news.yahoo.com/white-house-exempts-syria-airstrikes-from-tight-standards-on-civilian-deaths-183724795.html.

[103] See A/68/389, paras. 69–72.

[104] See Nils Melzer, "Interpretive guidance on the notion of direct participation in hostilities under international humanitarian law", ICRC. Available from www.icrc.org/eng/assets/files/other/icrc-002-0990.pdf.

54. In Iraq, there have been numerous reports of civilian casualties in air strikes and artillery operations attributed to Iraqi and associated forces, which raise serious questions as to the proportionality of those military operations.[105] In a welcome development, on 13 September 2014, the Prime Minister of Iraq ordered the Iraqi air force to suspend bombardments in civilian areas, including those controlled by ISIL, and expressed his commitment to protecting civilians.[106] There are also confirmed instances in which Iraqi forces have dropped leaflets warning civilians to evacuate ISIL-controlled areas owing to impending military action.

55. In October 2013, the Government of the Syrian Arab Republic intensified its widespread and systematic attack against the civilian population of Aleppo for allegedly supporting or hosting armed groups. At the time of writing, government forces were employing a similar strategy in Ar-Raqqah, the "capital" of ISIL, with apparent disregard for the principle of distinction.[107] It has been reported that civilians were killed in indiscriminate and disproportionate attacks by the Government on ISIL-controlled areas of Aleppo, Ar-Raqqah, Dayr az-Zawr and Al-Hasakah governorates.[108] On 18 October 2014, in Minbej (Aleppo), government forces reportedly hit a bakery, killing approximately 25 civilians. In July 2014, in Al-Mayadin (Dayr az-Zawr), government air strikes seemingly targeted a municipal building being used as an ISIL base, but also hit a market, killing 13 civilians. On 3 September 2014, in Al-Shula (Dayr az-Zawr), a government jet struck an ISIL checkpoint and reportedly killed 21 civilians, most of them children.

56. The coalition rarely cites casualty data, although the chief of the Air Force of Jordan estimated in February 2015 that the alliance had killed 7,000 ISIL militants.[109] In contrast, the coalition has conceded no non-combatant deaths in seven months of air strikes, despite clear indications to the contrary. Verification of fatalities remains difficult. That said, credible monitoring groups and media and social media sites in both Iraq and the Syrian Arab Republic have recorded casualties. A provisional analysis by the not-for-profit project Airwars.org indicates that an estimated 100 coalition air strikes (out of more than 3,000) had been flagged for concern by 27 March 2015. A non-combatant death toll as high as 420, with over 100 additional claimed "friendly fire" fatalities, were reported. These figures need to be treated with much caution as many are single-source incidents, are poorly reported or are linked to events in which the cause of death remains contested. Nevertheless, some cases are well-documented with eyewitness testimony, video and photographic evidence, missile fragments, named victims and/or confirmed coalition air strikes at the location. According to the United States Central Command, of the 38 incidents of concern it has examined, 34 have been discounted while four civilian casualty allegations are currently being investigated in three separate investigations. Even so, United States Central Command continues to insist that "no non-combatant deaths from coalition air strikes in either Iraq or Syria have officially been confirmed".[110] This would appear highly questionable given the intensity of the air war and the accumulating evidence base.

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[105] See UNAMI/OHCHR, "Report on the Protection of Civilians in Armed Conflict in Iraq: 11 September–10 December 2014", p. 17.

[106] See "Iraq's prime minister halts airstrikes in civilian areas", Deutsche Welle, 13 September 2014. Available from www.dw.de/iraqs-prime-minister-halts-airstrikes-in-civilian-areas/a-17920325.

[107] See A/HRC/28/69, para. 50.

[108] Ibid., annex 2, para. 53.

[109] See "Jordan: ISIS lost 20% of its military capabilities", *Al Arabiya News*, 8 February 2015. Available from http://english.alarabiya.net/en/News/middle-east/2015/02/08/Jordan-ISIS-lost-20-of-its-military-capabilities.html.

[110] On-the-record e-mail from United States Central Command spokesman Major Omar Villarreal, 25 March 2015.

The Independent International Commission of Inquiry on the Syrian Arab Republic, for example, first reported coalition-inflicted civilian casualties in November 2014.[111]

57. There remains a significant absence of transparency with regard to coalition operations in both Iraq and the Syrian Arab Republic. Each nation participating in the air war operates under unique rules of engagement, and transparency levels differ significantly.[112] While the United States and Canada routinely report the date and location of each strike, other nations only report weekly or monthly. In the case of Belgium and the Arab members of the coalition, no public reporting of any actions presently occurs. With air strikes being carried out by multiple actors, including the Syrian and Iraqi air forces, as well as by the Islamic Republic of Iran — often at the same locations as coalition strikes — it remains impossible for affected civilians to know, in most circumstances, which State was responsible for an event, a concern noted by the United Nations Assistance Mission for Iraq (UNAMI).[113] Transparency on the part of coalition States conducting these operations is therefore imperative.

58. The Special Rapporteur recalls that, in any case in which civilians have been, or appeared to have been, killed, the State responsible is under an obligation to conduct a prompt, independent and impartial fact-finding inquiry and to provide a detailed public explanation. This obligation is triggered whenever there is a plausible indication from any source that civilian casualties have been sustained, including where the facts are unclear or the information partial or circumstantial, and whether civilian casualties were anticipated or not.[114]

G. Role of the Security Council in authorizing the use of force

59. The actions of ISIL have undermined international peace and security, grossly and systematically abused the fundamental rights of civilians on a wide scale, gravely violated international humanitarian law and international human rights law and fractured the territorial integrity of two States. Nonetheless, not all the permanent members of the Security Council are in favour of taking more robust military measures. As noted by the Secretary-General, the privileges of tenure and the veto power that the permanent members of the Council have been granted under the Charter entail a particular responsibility to not employ their veto in situations of manifest failure to meet obligations relating to the responsibility to protect civilians.[115] The Special Rapporteur notes that, given the reports relating to the possible commission of acts of genocide, Council members may have a more specific responsibility[116] given that they are all bound by the obligation to prevent this most

[111] See "Rule of terror", para. 23.

[112] See Chris Woods, "Pentagon in Denial About Civilian Casualties of U.S. Airstrikes in Iraq and Syria," *Foreign Policy*, 3 December 2014. Available from http://foreignpolicy.com/2014/12/03/pentagon-in-denial-about-civilian-casualties-of-u-s-airstrikes-in-iraq-and-syria/.

[113] See UNAMI/OHCHR, "Report on the Protection of Civilians in Armed Conflict in Iraq: 11 September–10 December 2014", footnote 32.

[114] See A/68/389, paras. 41–45.

[115] See the report of the Secretary-General on implementing the responsibility to protect (A/63/677), para. 61.

[116] "A State's obligation to prevent, and the corresponding duty to act, arise at the instant that the State learns of, or should normally have learned of, the existence of a serious risk that genocide will be committed". See the International Court of Justice, Application of the Convention on the Prevention and Punishment of the Crime of Genocide (*Bosnia and Herzegovina v. Serbia and Montenegro*) (Merits), Judgement of 26 February 2007, paras. 430 and 431.

serious of international crimes.[117] The Special Rapporteur notes with interest the broad support among many Member States, civil society groups and representatives of the United Nations for initiatives relating to a responsibility to refrain from using veto powers to block action aimed at ending atrocity crimes.

IV. Conclusions and recommendations

60. **States are under an obligation to take measures to protect civilian populations from widespread and systematic acts of violence and terrorism. It is essential that any response be grounded in respect for international law, including international humanitarian law, international human rights law and refugee law.**

61. **In the light of the grave international crimes and systematic human rights violations committed by ISIL forces in Iraq and the Syrian Arab Republic, the Special Rapporteur:**

(a) **Recommends to the Security Council that the situation in Iraq and the Syrian Arab Republic be referred to the International Criminal Court as a matter of urgency, or that an ad hoc tribunal be established promptly to try those responsible;**

(b) **Calls on Iraq and the Syrian Arab Republic to become parties to the Rome Statute and to accept the jurisdiction of the International Criminal Court over the current situation;**

(c) **Recommends that States prosecute individuals who have committed such crimes where they are able to exercise jurisdiction.**

62. **States must ensure that all the measures they adopt at the national level to address the threat posed by ISIL and other such groups, including measures taken to implement Security Council resolution 2178 (2014), fully comply with their obligations under international human rights law, as outlined in the present report.**

63. **All States engaged in military action against ISIL in Iraq and the Syrian Arab Republic are under an obligation to conduct prompt, independent and impartial fact-finding inquiries in any case where there is a plausible indication that civilian casualties have been sustained, and to make public the results.**

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[117] All permanent members are bound by art. 1 of the Convention on the Prevention and Punishment of the Crime of Genocide.